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The Honorable Lonny R. Suko

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25 UNITED STATES DISTRICT COURT
26 EASTERN DISTRICT OF WASHINGTON

27 NORTHWEST ENVIRONMENTAL
28 DEFENSE CENTER, a non-profit
29 organization,

Case No.: CV-13-105-LRS

CONSENT DECREE

Plaintiff,

CONSENT DECREE - (No. CV-13-105-LRS) - 1

1
2 v.
3 ADM MILLING CO., a corporation,
4 Defendant.
5

6 The following Consent Decree is entered into between Plaintiff
7 Northwest Environmental Defense Center (“NEDC”) and Defendant ADM
8 Milling Co. and its affiliates (“ADM Milling”). These parties shall be
9 collectively referred to herein as the “Parties” and individually as a “Party,”
10 unless specifically identified otherwise.
11
12

13 **RECITALS**

14 **WHEREAS**, ADM Milling owns and operates a flour mill facility
15 located at 2301 East Trent Avenue in Spokane, Washington 99202 (the
16 “Facility”);
17

18 **WHEREAS**, under the National Pollutant Discharge Elimination
19 System (“NPDES”), an Industrial Stormwater General Permit (the “Permit”)
20 has been issued to ADM Milling by the Washington State Department of
21 Ecology (“Ecology”);
22
23

24 **WHEREAS**, NEDC has alleged in a letter (the “Notice Letter”) dated
25 December 12, 2012, sent to ADM Milling, that ADM Milling has violated
26

1 and continues to violate certain conditions of the Permit and the Clean Water
2 Act, and that NEDC intended to file a citizen suit pursuant to section 505 of
3 the Clean Water Act ("CWA"), 33 U.S.C. § 1365;
4

5 **WHEREAS**, while the parties were engaged in settlement talks,
6 NEDC filed its Complaint in this action;
7

8 **WHEREAS**, the parties reached a settlement and pursuant to this
9 settlement NEDC agreed to dismiss three originally named individual
10 defendants from this action, and the parties filed a Stipulation of Dismissal
11 dismissing such defendants with prejudice;
12

13 **WHEREAS** NEDC then filed, and ADM Milling consented to in
14 writing, an Amended Complaint naming only ADM Milling as defendant;
15

16 **WHEREAS**, ADM Milling neither admits nor denies the allegations
17 NEDC made in the Notice Letter, Complaint or Amended Complaint; and
18

19 **WHEREAS**, the Parties agree that resolution of this matter without
20 protracted litigation is in their best interests; and
21

22 **NOW, THEREFORE, IT IS HEREBY STIPULATED AND**
23 **AGREED BETWEEN THE PARTIES, AND ORDERED AND DECREED**
24 **BY THE COURT, AS FOLLOWS:**
25

26 CONSENT DECREE - (No. CV-13-105-LRS) - 3

JURISDICTION AND VENUE

1. For the purposes of entry and enforcement of this Consent Decree, the Parties stipulate that the United States District Court for the Eastern District of Washington has jurisdiction over the Parties and subject matter of this action. The Parties further stipulate that venue is appropriate in the United States District Court for the Eastern District of Washington.

EFFECT OF CONSENT DECREE AND SETTLEMENT AGREEMENT

2. This Consent Decree memorializes and is entered into according to the terms of the Settlement Agreement entered into between the Parties and which was executed by NEDC on April 25, 2013 and ADM Milling on April 30, 2013 (“Settlement Agreement”).

3. In the event that there is any inconsistency between the terms of this Consent Decree and the Settlement Agreement, the terms of the Consent Decree shall control.

4. Neither this Consent Decree nor any payment made pursuant to this Consent Decree shall constitute evidence or be construed as a finding, adjudication, or acknowledgement of any fact, law, or liability, nor shall it be construed as an admission of violation of any law, rule, regulation, permit, or

1 administrative order by ADM Milling. However, this Consent Decree and
2 any payments made pursuant to this Consent Decree may constitute evidence
3 in actions seeking to enforce compliance with this Consent Decree.
4

5 5. The Parties, including any successors or assigns, agree to be
6 bound by this Consent Decree and not to contest its validity in any
7 subsequent proceeding to implement and enforce its terms.
8

9 6. ADM Milling maintains and reserves all defenses it may have to
10 any alleged violations which could be alleged in the future by a party which
11 is not a party to this Consent Decree.
12

13 7. This Consent Decree addresses and fully resolves all violations
14 alleged by NEDC up to and through the Termination Date of this Consent
15 Decree, which is set forth in Paragraph 10 below.
16

17 **EPA AND DOJ REVIEW**
18

19 8. The Parties recognize that, pursuant to 33 U.S.C. § 1365(c)(3),
20 this Consent Decree cannot be entered until forty-five (45) days after the
21 receipt of a copy of the proposed Consent Decree by the United States
22 Environmental Protection Agency (“EPA”) and the United States Attorney
23 General. NEDC shall submit this Consent Decree to EPA and the U.S.
24 Department Of Justice (“DOJ”) within three days of filing this Consent
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26

CONSENT DECREE - (No. CV-13-105-LRS) - 5

1 Decree with the Court for review consistent with 40 C.F.R. § 135.5. The
2 agency review period expires 45 days after receipt by both agencies, as will
3 be evidenced by the required certified return receipts. Upon expiration of
4 the 45-day review period provided by 33 U.S.C. § 1365(c)(3), the Parties will
5 jointly move the Court for entry of this Decree. In the event that the EPA or
6 the DOJ comment negatively on the provisions of this Consent Decree, the
7 parties agree to meet and confer to attempt to resolve the issues raised by
8 either agency.
9
10
11

12 **EFFECTIVE DATE AND TERMINATION DATE**

13 9. The “Effective Date” of this Consent Decree shall be the date
14 this Court orders entry of this Consent Decree.
15

16 10. The “Termination Date” of this Consent Decree shall be on
17 August 1, 2015. The Release of Claims, which is set forth in Paragraphs 16-
18 18 below, shall survive the Termination Date.
19

20 **OBLIGATIONS OF THE PARTIES**

21 11. **Stormwater Control Improvements.**

22 11.1 Within thirty (30) days of the Effective Date, ADM
23 Milling shall have taken the following actions:
24
25
26

1 (a) Retain an engineer qualified to assist ADM Milling
2 in determining the sources of any pollutants being collected in stormwater at
3 the Facility and to provide technical expertise required to design and
4 implement the measures necessary to reduce or eliminate the discharge of
5 stormwater from the Facility; and
6

7
8 (b) Review the Facility's operations and conduct such
9 onsite investigation, sampling, and testing as necessary to determine the
10 potential source(s) of pollutants that may be discharged in stormwater from
11 the Facility.
12

13 11.2 With the aid of the engineer, ADM Milling shall identify
14 and design physical and procedural stormwater control measures to reduce or
15 eliminate the discharge of pollutants in stormwater, or eliminate the
16 discharge of stormwater.
17

18 11.3 Within sixty (60) days of the Effective Date, ADM
19 Milling shall revise its Stormwater Pollution Prevention Plan ("SWPPP") to
20 include all of the physical and procedural changes identified as necessary to
21 ensure compliance with the Permit's requirements. The draft SWPPP shall
22 be submitted to Ecology for review.
23
24
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26

1 11.4 Within ninety (90) days of the Effective Date, ADM
2 Milling shall produce a final revised SWPPP and shall in good faith address
3 all physical and procedural changes identified by Ecology, if any, as
4 necessary to ensure compliance with the Permit.
5

6 11.5 ADM Milling shall provide NEDC with a confirmation by
7 email upon completion of each of these measures under this Paragraph 11,
8 sent to Mark Riskedahl, NEDC Executive Director, msr@nedc.org.
9

10
11 12. **Stormwater Sampling.**

12 12.1 ADM Milling agrees to identify any point of discharge to
13 surface waters or storm sewers at the Facility, including any potential
14 discharges from the facility to the storm drain located at the corner of E.
15 Springfield Ave. and N. Crestline St., and modify its SWPPP, if necessary, to
16 reflect such discharge points within ninety (90) days of the Effective Date.
17

18 12.2 ADM Milling agrees, in accordance with the Permit, to
19 either:
20

21 (a) Monitor each distinct point of discharge; or
22

23 (b) Monitor from one point of discharge and provide
24 documentation as required by condition S.3 of the Permit to establish that
25

26 ADM Milling expects the discharge points to discharge substantially

1 identical effluents. ADM Milling shall update its SWPPP to include this
2 documentation within ninety (90) days of the Effective Date.
3

4 12.3 Upon implementation of any measures identified in
5 Paragraph 11, ADM Milling agrees to monitor 6 times per wet season
6 (October 1 - June 30) for two years, provided that there are a sufficient
7 number of suitable rainfall events (i.e., precipitation yielding observable
8 stormwater flow) during each wet season to perform 6 monitoring events, for
9 pollutants identified in the Permit for stormwater discharges associated with
10 industrial activity for the Food and Kindred Products sector (turbidity, pH, oil
11 sheen, copper, zinc, biological oxygen demand, nitrogen, phosphorous).
12
13

14
15 13. **Management and Reporting.**

16 13.1 ADM Milling shall designate an employee responsible for
17 the operation, maintenance and upkeep of the stormwater management
18 measures described in the Facility's SWPPP, the requirements of the Permit
19 and the terms of this Consent Decree. Such designated employee shall
20 receive training necessary to conduct sampling, record keeping and reporting
21 under the Permit, and fulfill the requirements of this Consent Decree.
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1 13.2 ADM Milling shall develop a monthly compliance
2 checklist that includes each requirement of the Permit and the monitoring and
3
4 sampling as required in Paragraph 12.3.

5 13.3 ADM Milling shall complete monthly compliance checks
6
7 using the checklist it develops for each month from July 2013 through June
8 2014.

9 13.4 ADM Milling shall conduct semi-annual audits of the
10 Facility's compliance with the Permit. Such audits shall occur on or before
11 July 15, 2013; January 15, 2014; July 15, 2014; and January 15, 2015. ADM
12 Milling agrees to employ audit results to revise or otherwise improve its
13 SWPPP as suggested by its auditor.
14
15

16 13.5 ADM Milling shall submit by email copies of the DMRs
17 submitted to Ecology, copying NEDC as part of its submittal, Mark
18 Riskedahl, NEDC Executive Director, msr@nedc.org. NEDC agrees not to
19 use these results against ADM Milling in the development or prosecution of
20 any enforcement action.
21
22

23 14. **Payments.**

24 14.1 Within thirty (30) days of the Effective Date, ADM
25 Milling shall make a charitable contribution in the amount of fifteen thousand
26

1 dollars (\$15,000) to the Spokane Riverkeeper, a nonprofit organization
2 located in Spokane. The funding will support an environmental education
3 and outreach project as more fully described in Paragraph 15. The Spokane
4 Riverkeeper shall provide ADM Milling with four accountings specifying the
5 amount and purpose of expenditures and indicating funds remaining from the
6 \$15,000. Such accountings shall be provided on August 31, 2013,
7
8 February 28, 2014, August 31, 2014, and upon completion of the project. In
9 the event there are any funds remaining from the \$15,000 upon completion of
10 the project, Spokane Riverkeeper shall donate the remaining funds to the City
11 of Spokane's Stormwater Management Program,
12 <http://spokanestormwater.com/Stormwater.aspx>. This charitable contribution
13 operates in lieu of a penalty against ADM Milling.
14

15
16
17 14.2 In addition to the payment set forth in the preceding
18 paragraph, the Parties agree to suspend a payment of twelve thousand dollars
19 (\$12,000).
20

21 (a) If, at any time after ADM Milling produces a final
22 revised SWPPP, it fails to comply with its obligations under this Consent
23 Decree, ADM Milling shall pay the Spokane Riverkeeper one thousand
24
25
26

1 dollars (\$1,000) per month during each month in which ADM Milling is not
2 in compliance with this Consent Decree.

3
4 (b) In no event shall the payments under this paragraph
5 exceed a total of twelve thousand dollars (\$12,000).

6
7 (c) NEDC agrees that these suspended payments shall
8 be NEDC's exclusive remedy against ADM Milling.

9 14.3 Within thirty (30) days of the Effective Date, ADM
10 Milling shall provide a contribution to NEDC in the amount of \$17,500.
11
12 NEDC shall use this contribution to offset necessary fees and costs incurred
13 in this action.

14
15 **SUPPLEMENTAL ENVIRONMENTAL PROJECT**

16 15. Over a period of 18 months, the Spokane Riverkeeper, with the
17 sponsorship of ADM Milling, and with the cooperation of the Spokane River
18 Forum/EnviroStars Program, will utilize ADM's charitable contribution of
19 \$15,000, as set forth in Paragraph 14.1, exclusively to implement a
20 stormwater education program directed at businesses in the Union Basin in
21 Spokane. The project will consist of three primary elements:

22 15.1 Door-to-door visits to provide businesses with copies of
23 the "Understanding Stormwater Permitting" manual that was created by the
24

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26 CONSENT DECREE - (No. CV-13-105-LRS) - 12

1 City of Spokane, Gonzaga University, the Spokane River Forum and Spokane
2 Riverkeeper. A copy of the manual can be found here:
3
4 http://www.spokaneriver.net/?page_id=7688.

5 15.2 Developing new education materials that have proven
6 effective to educate businesses on stormwater/spill management issues. In
7 particular, the project will include printing of the “Keep it Clean: Use the
8 4Cs” posters and spill response cards. These, along with spill response kits
9 for small businesses, will be provided as part of the individual business
10 outreach efforts. The Spokane Riverkeeper will invite ADM Milling and
11 other community partners to provide logos to place on the educational
12 materials and spill kits to recognize their support of these efforts and
13 commitment to addressing stormwater in the community. All of these
14 outreach techniques have been demonstrated by a recent study as effective
15 methods of business outreach as indicated by a Cunningham Environmental
16 Consulting study titled, “Stormwater Business Education Template:
17 FocusGroup Report.”
18

19 See: [http://www.ecy.wa.gov/programs/wq/stormwater/municipal/MUNIdocs/](http://www.ecy.wa.gov/programs/wq/stormwater/municipal/MUNIdocs/FocusGroupReportKitsapBizTemplate.pdf)
20 FocusGroupReportKitsapBizTemplate.pdf. Examples of these materials are
21 attached.
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CONSENT DECREE - (No. CV-13-105-LRS) - 13

1 15.3 A community workshop will be conducted to advance the
2 understanding of stormwater management and stormwater permitting
3 requirements. The workshop will be directed by the water resources staff
4 from the Spokane Community College, as well as staff from city permitting,
5 regulatory agencies, and interested businesses. ADM Milling will be invited
6 to participate in a role they see fit and appropriate.
7

8
9 **RELEASE OF CLAIMS**

10 16. NEDC releases and discharges ADM Milling and the officers,
11 directors, shareholders, employees, agents, affiliates and consultants of ADM
12 Milling from any and all claims, causes of action, or liability under the Clean
13 Water Act, 33 U.S.C. § 1251 et seq., or any other federal, state or common
14 law, for damages, penalties, fines, injunctive relief, or any other claim or
15 relief:
16
17

18 16.1 Relating to or resulting from discharges or releases of
19 pollutants from the Facility occurring prior to the Termination Date; and
20

21 16.2 For any matter, including past violations, alleged in the
22 Notice Letter, Complaint and Amended Complaint; and
23
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1 16.3 For any alleged violations of the Permit, ADM Milling's
2 SWPPP, the Clean Water Act and its regulations, or related state law and
3 regulations, occurring prior to the Termination Date.
4

5 17. The Parties agree that this Consent Decree is in full settlement of
6 all civil and administrative claims and liabilities which might have been
7 asserted by NEDC against ADM Milling for any violations which may have
8 occurred or are alleged to have occurred prior to the Effective Date, and up to
9 and through the Termination Date.
10

11 18. ADM Milling releases and discharges NEDC, its
12 representatives, assigns, agents, employees, officers, and attorneys from any
13 and all claims, liability, demands, penalties, costs and causes of action of
14 every nature which concern matters covered in Paragraph 16.
15

16
17 **DISPUTE RESOLUTION AND CONTINUING JURISDICTION**
18

19 19. If a dispute under this Consent Decree arises, or if either Party
20 believes that a breach of this Consent Decree has occurred, the Parties shall
21 meet and confer within fourteen (14) days of receiving written notification
22 from the other Party of a request for a meeting. This notification shall
23 explicitly state the nature, the underlying facts and the legal grounds for the
24 dispute or alleged breach. At this meeting, the Parties shall discuss the
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CONSENT DECREE - (No. CV-13-105-LRS) - 15

1 dispute or alleged breach and seek to develop a mutually agreed upon plan,
2 including implementation dates, to resolve the dispute or alleged breach. If
3 the Parties fail to meet and confer or if the meeting does not resolve the issue,
4 and after at least seven (7) days have elapsed since the meet and confer
5 occurred or should have occurred, each Party shall be entitled to all rights
6 and remedies under the law, including bringing a motion before the Court.
7

8
9 20. The Court shall retain jurisdiction over the Parties for the term
10 of this Consent Decree with respect to: (i) disputes arising under this Consent
11 Decree for which any of the Parties invoke the dispute resolution provision
12 herein; (ii) enforcement of this Consent Decree; and (iii) modification or
13 termination of this Consent Decree in whole or in part.
14
15

16 **GENERAL PROVISIONS**

17 21. Construction. The language in all parts of this Consent Decree,
18 unless otherwise stated, shall be construed according to its plain and ordinary
19 meaning.
20

21 22. Permit Terms. In the event any of the rights or obligations of
22 the Parties as set forth in this Consent Decree are found to be in conflict with
23 the terms of the Permit, including terms of the Permit as it may be revised,
24 altered, amended or withdrawn in the future, the Permit terms shall control.
25
26

1 The Parties further agree that a withdrawal, termination or discontinuance of
2 the Permit by Ecology shall terminate ADM Milling's obligations hereunder.

3
4 23. Severability. In the event any of the provisions of this Consent
5 Decree are held by a court to be unenforceable, the validity of the enforceable
6 provisions shall not be adversely affected.

7
8 24. Entire and Final Agreement/Modification. This Consent Decree
9 shall constitute the entire and final agreement among the Parties concerning
10 the subject matter of this action and shall supersede all previous
11 correspondence, communications, agreements and understandings, whether
12 oral or written, between the Parties. This Consent Decree may not be
13 modified, in whole or in part, except in writing and signed by the Parties,
14 with the approval of the Court.

15
16 25. Force Majeure. If ADM Milling is prevented from performing
17 its duties under this Consent Decree by circumstances beyond its control,
18 including, without limitation, fire, flood, labor dispute, or act of God ("Force
19 Majeure"), or action or non-action by, or inability to obtain the necessary
20 authorizations or approvals from, any government agency, then ADM Milling
21 shall be excused from performance hereunder during the period of such
22 disability. Notwithstanding anything herein to the contrary, the term "Force
23
24
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CONSENT DECREE - (No. CV-13-105-LRS) - 17

1 Majeure” does not include, and ADM Milling shall not be excused from
2 performance under this Consent Decree for, events relating to increased
3 costs, including, without limitation, increased costs of fuel, labor, insurance,
4 or other expenses of performing the obligations hereunder.
5

6 26. Choice of Law. This Consent Decree shall be governed by and
7 construed in accordance with the laws of the State of Washington, except to
8 the extent federal law applies to its subject matter or enforcement.
9

10 27. Counterparts/Signatures. This Consent Decree may be executed
11 in any number of counterparts, all of which together shall constitute one
12 original document. Facsimile or scanned copies of original signatures shall
13 be deemed to be originally executed signatures.
14

15 28. Authority. The Parties certify that their undersigned
16 representatives are fully authorized to enter into this Consent Decree, to
17 execute it on behalf of the Parties and to legally bind the Parties to its terms.
18

19 29. Court Approval. If for any reason the Court should decline to
20 approve this Consent Decree in the form presented, the Parties shall use their
21 best efforts to work together to modify this Consent Decree within thirty (30)
22 days so that it is acceptable to the Court.
23

24 The Parties hereby enter into this Consent Decree.
25

26 CONSENT DECREE - (No. CV-13-105-LRS) - 18

1 DATED this ____ day of ____ 2013. NORTHWEST ENVIRONMENTAL
2 DEFENSE CENTER

3
4 _____
5 Name: _____
6 Title: _____

7 DATED this ____ day of ____ 2013. By: s/Marla S. Nelson
8 MARLA S. NELSON, WSBA
9 #45611
10 Northwest Environmental Defense
11 Center
12 10015 S.W. Terwilliger Blvd.
13 Portland, OR 97212
14 Tel: (503) 768-6726
msnelson@nedc.org
Attorneys for Plaintiff

15 DATED this ____ day of ____ 2013. ADM MILLING CO.

16
17 _____
18 Name: _____
19 Title: _____

1
2
3 DATED this ____ day of ____ 2013.

By: s/ Harry Edward Grant

Harry Edward Grant, WSBA #13494

Margaret K. Cerrato-Blue, WSBA
#23812

RIDDELL WILLIAMS P.S.

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Seattle, Washington 98154

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Fax: (206) 389-1708

hgrant@riddellwilliams.com

mcerrattoblue@riddellwilliams.com

Attorneys for Defendant ADM

Milling Co.

1
2 IT IS HEREBY ORDERED that this Consent Decree is approved and
3 entered accordingly, subject to the ongoing jurisdiction of the Court for the
4 purposes of enforcement of this Consent Decree.
5

6 APPROVED AND SO ORDERED:

7 DATED: July 23, 2013
8

9 *s/Lonny R. Suko*

10 _____
11 The Honorable Lonny R. Suko
12 United States District Court
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